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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 846

KANSAS CITY TRANSIT, INC.,
Petitioner,

vs.

KANSAS CITY, MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

Kansas City Transit, Inc. ("Transit") prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri entered in the above entitled case on July 11, 1966.

OPINIONS BELOW.

The memorandum opinion of the Judge of the State Trial Court (R. 23) is unreported and is printed in Appendix B hereto, *infra,* p. A16. The opinion of the Supreme Court of Missouri (R. 163), printed in Appendix A hereto, *infra,* p. A1, is reported in 406 S.W.2d 18 (Mo. 1966).

JURISDICTION.

The judgment of the Supreme Court of Missouri was entered on July 11, 1966 (R. 162). Motion for rehearing or transfer to the court en banc was denied on September 12, 1966 (R. 192). An order staying the mandate of the Supreme Court of Missouri for ninety (90) days was entered on September 15, 1966 (R. 192). Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED.

Whether enforcement of a contractual obligation against Transit, when the consideration for such obligation is unenforceable on constitutional grounds, constitutes deprivation of its property without due process of law; and whether enforcement of said obligation, when it results in economic discrimination against Transit, denies it equal protection of the laws.

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. U.S.C.A., Const. Amend. XIV, Section 1. That Amendment provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Kansas City, Missouri ("City"), filed an action on June 26, 1964, in the Circuit Court of Jackson County, Missouri, at Kansas City, against Transit alleging breach of a contract between the City and Transit (R. 1). Transit filed a motion for summary judgment based on the grounds, among others, that to construe the contract as pleaded by the City would amount to a violation of the constitutional safeguards guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. 15). The City also filed a motion for summary judgment (R. 15), and after consideration of the pleadings, affidavits, stipulations and exhibits, the trial judge, having found no genuine issue of material fact, entered an order overruling Transit's motion and sustaining the City's motion (R. 23). Judgment was entered in favor of the City and against Transit for $668,870.38, plus costs (R. 23).

The trial judge discussed Transit's federal grounds for its motion in his Memorandum Opinion. His principal reason for ruling against Transit on the federal issues was that the action involved only the enforcement of a contract voluntarily executed by the parties (R. 30; Appendix B, *infra*, p. A22).

The constitutional argument was again urged by Transit as one of four main points in its brief filed with the Supreme Court of Missouri (R. 81). That court ruled against Transit on the issues, because it assumed Transit was receiving consideration for its contractual obligation in the form of an alleged exclusive franchise from the City (when none was in existence), and it further assumed the City had fully performed the contract on its part and thus had a vested right to performance on the part of Transit (R. 168-71; Appendix A, *infra*, pp. A6-A9).

On July 31, 1917, the City, several railroads and The Kansas City Railways Company (Transit's predecessor) entered into an agreement for the construction and maintenance of the 23rd Street Viaduct ("Viaduct"), which bridges the West Bottoms in Kansas City (Pl. Ex. 1). The Viaduct extends from Kansas Avenue in Kansas City, Kansas, across the Kaw River and the Missouri-Kansas state line to Twenty-Third Street, a major trafficway in Kansas City, Missouri (Pl. Ex. 7). The initial cost of construction was estimated at $602,763. With regard to maintenance of the Viaduct, the contract provided:

> "14. MAINTENANCE. The viaduct and its approaches . . . shall be the property of Kansas City, Missouri, as and for a public highway, and Kansas City shall be responsible for maintaining and lighting said structure and its approaches and keeping them in repair; but each of the parties hereto . . . shall contribute to the cost of such maintenance, repairs or the reconstruction thereof, except as hereinafter provided as follows:
>
> ". . . one-third thereof by the Kansas City Railways Company; . . ."

Prior to completion of the Viaduct, Kansas City Railways Company went into receivership, and in the course thereof the Receivers and the City entered into an agreement dated March 4, 1921, modifying the 1917 contract (Pl. Ex. 2). The relevant parts of that modification are set out as follows:

> "(2). Use by Street Railway: . . .
>
> "It is agreed that . . . *the said Receivers and their successors, The Kansas City Railways Company, its successors, grantees, assigns, licensees and lessees, shall have the exclusive use and occupancy of the space set apart for street cars on the main viaduct, and the use*

of the 'Wyoming Street Approach' thereto, to the exclusion of all other street cars for its or their modern double track electric street railroad, so long as such viaduct and its approach, or any renewals thereof, or substitute therefor, may last. If the street cars of other persons or corporations are permitted to use said viaduct and its approaches, or any part thereof, then and in that event, such other persons or corporations so using said structure for street car purposes shall pay to said Receivers . . . . or to The Kansas City Railways Company, its successors, . . . a reasonable compensation for such use, based upon one-third of the cost of construction and maintenance (including repairs and reconstruction) of said structure so paid out by the said Receivers or The Kansas City Railways Company, its successors, . . . or any or all of them, and Kansas City, Missouri hereby agrees that the said Receivers or The Kansas City Railways Company, its successors, . . . may make, collect, and retain for its or their sole benefit, such reasonable charge for the use of said structure by other persons or corporations for street car purposes. *And Kansas City, Missouri, hereby agrees that it will not permit any other persons or companies to use said viaduct and approach, or any part thereof, for the operation of street cars thereon,* without the consent of said Receivers, . . . The Kansas City Railways Company, its successors, . . . nor without making provision for the payment of such reasonable compensation, nor permit such use in such a manner, or to such an extent as to unreasonably interfere with the use thereof by the Receivers, their successor or successors, The Kansas City Railways Company, its successor, grantees, assigns and lessees. . . . (Emphasis added.)

"(3) Maintenance: It is further agreed that the said Receivers, . . . the Kansas City Railways Company, its successors, . . . shall be obligated to keep and perform all of the obligations to be kept and performed by The Kansas City Railways Company, its successors, assigns,

under Clause 14 of the contract dated July 31, 1917, relating to maintenance, repairs and reconstruction of said viaduct and its approaches."

The 1921 Agreement was approved by order of the United States District Court.

Transit commenced substitution of trolley bus and motor bus lines for street railway facilities in 1937. In 1948 and 1950, it substituted buses for street cars on the lines crossing the Viaduct (R. 18), pursuant to approval by the City (Pl. Exs. 12, 13). Transit operated motor buses and trolley buses over the Viaduct from 1950 until February 1, 1954, when it was closed for alterations (Appendix C, *infra*, p. A24).

Upon completion of the repairs, Transit refused to resume operations over the Viaduct and refused to contribute any portion of the cost of the alterations (Appendix C, *infra*, p. A25). Thereafter, Transit and the City entered into a stipulation dated September 3, 1954, for the continuation of service over the Viaduct, but neither party waived its rights under the contract (R. 12).

The City then filed an application with the Missouri Public Service Commission for approval of the alterations to the Viaduct and apportionment of the costs thereof (Appendix C, *infra*, p. A23). The Commission held that it had jurisdiction over apportionment of costs in the case, pursuant to §389.640, R.S. Mo. 1949; however, it determined that because Kansas City Public Service Company (Transit's predecessor) had theretofore abandoned its streetcar tracks over the Viaduct, the reconstruction of the Viaduct that was necessary was not caused by reason of the tracks being on the Viaduct and therefore the Commission refrained from assessing against the Company any costs incurred by reason of the reconstruction. The Commission

also stated that the liability of Kansas City Public Service Company (Transit), if any, would result from the contract, and such liability would not come under the Commission's jurisdiction (Appendix C, *infra*, p. A32).

On November 18, 1960, the City made application for an order from the Missouri Public Service Commission approving repairs of the Viaduct, and such order was entered November 30, 1960 (Pl. Ex. 7). The total cost of repairs, excluding signs and lighting, was $2,006,611.15 (R. 21-2), and the City demanded that Transit pay one-third, or $668,870.38 (Pl. Ex. 8). Transit denied liability and refused payment (Pl. Ex. 9). The City then brought this action.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below presents a federal question of substance not heretofore determined by this Court. The Court held, in effect, that even though the exclusive use promised to Transit under the contract may be unenforceable on constitutional grounds, Transit is still liable on its promise to pay one-third of the maintenance costs. The federal question raised is whether or not Transit, by virtue of the construction and the consequent enforcement of the contract, has been deprived of its property without due process of law.

By means of an erroneous basic assumption, the court below sought to avoid this constitutional problem. It assumed that Transit has an exclusive franchise from the City to operate as a common carrier of passengers in the Kansas City area. The opinion develops the thesis as follows:

> ". . . the appellant has a *franchise* from Kansas City to operate as a common carrier of passengers in the greater Kansas City area. . . . it was no doubt to

> its *franchise* advantage to surrender its tracks . . . when it voluntarily made the substitution it necessarily used the viaduct in common with all other vehicular traffic including other types of common carriers of both persons and freight but not upon this record in derogation or infringement of its *franchise* rights.
>
> ". . . Transit yet enjoys its *exclusive franchise* use not only of the streets and highways in the city but as well of this and other viaducts." (Appendix A, *infra*, pp. A9-A10; Emphasis added).

Transit has no such franchise and has not had one since January 1, 1957 (R. 186). It operates in Missouri solely under the jurisdiction of the Public Service Commission. *Kansas City Terminal Ry. Co.* v. *Kansas City Transit*, 359 S.W.2d 698, 701 (Mo. 1962). Exclusive use of the Viaduct, or a portion of it, was the only consideration for Transit's promise to pay one-third of the maintenance while its competitors and all other vehicular traffic, which also benefit from the repairs giving rise to this litigation, travel free. That consideration is not now available to Transit for constitutional reasons, but Transit, the court below said, is still obligated for its promise under the contract.

In support of its decision, the court below quoted from its earlier opinion in *Kansas City* v. *Kansas City Terminal Ry. Co.*, 324 Mo. 882, 25 S.W.2d 1055 (1929), the following language:

> "The city having fully performed the contract on its part had, and has, a vested right to performance on the part of the Company." 324 Mo. at 907, 25 S.W.2d at 1066. (Quoted at Appendix A, *infra*, p. A7).

The City probably had a vested right in that case, but only because the Kansas City Terminal Railway continued to

use its right-of-way and thus was receiving the consideration for which it bargained. Transit bargained for an exclusive right-of-way across the Viaduct, but it is not receiving what was promised to it and cannot do so without placing an unconstitutional burden on interstate commerce.

The Viaduct in question runs between Missouri and Kansas and is a major trafficway of Kansas City, Missouri. If Transit sought to enforce a contractual right to exclude other common carriers or other vehicles from operating across the Viaduct, it would clearly be invalid. This type of interference with interstate commerce was described in *Buck* v. *Kuykendall*, 267 U.S. 307 (1925), at 315-16:

> "The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose, and in the same manner. . . . Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden, but to obstruct, it. Such state action is forbidden by the commerce clause."

Neither the City nor a judicial body could enforce Transit's exclusive use without imposing a direct burden upon interstate commerce. See *Edwards* v. *California*, 314 U.S. 160 (1941); *State of Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924); and *Lemke* v. *Farmers Grain Co. of Embden, N. D.*, 258 U.S. 50 (1922).

State courts are undoubtedly given great leeway in the development of common law concepts involving private claims. However, there are limitations beyond which state

courts cannot traverse with immunity. This Court has recognized constitutional limitations in an analogous case involving judicial enforcement of a common law claim for libel. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The rule of law applied by the Alabama courts was held constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments. Similarly, the court below has applied a rule of law in its enforcement of the contract against Transit that is constitutionally deficient for failure to provide the safeguards against deprivation of property without due process of law that are required by the Fourteenth Amendment. The rule of law applied by the court below imposes an obligation for which the consideration is invalid on constitutional grounds. Imposition of such an obligation is so arbitrary and capricious as to constitute a denial of due process.

2. The decision of the court below also conflicts with applicable decisions of this Court. To construe the contract so that Transit is now required to contribute to the maintenance of the Viaduct creates an arbitrary distinction between Transit and other common carriers by motor bus operating in Kansas City and across the Viaduct. Transit is subjected to a special, and thus discriminating, economic burden not imposed on others in the same class.

If Transit were the beneficiary of a franchise from the City giving it the exclusive right to transport passengers by motor bus or other means in Kansas City or across the Viaduct, it would clearly be in a separate class from other operators of motor buses or common carriers of passengers. But Transit has not had a franchise from Kansas City since 1957 (R. 186). Moreover, Transit was pre-

viously in a special class due to its operation as a street railroad which required tracks embedded in the streets and across viaducts, and it had the exclusive use of a part of the Viaduct in question.

Even though Transit is regulated by the State under the statutory sections pertaining to "street railroads," Chapter 391, Mo. Rev. Stats., 1959, that does not necessarily place it in a class separate from other motor carriers with respect to use of the Viaduct. The class at issue in this litigation consists of all common carriers which use the Viaduct. (A table reflecting vehicle traffic counts across the Viaduct appears at R. 137.) When Transit buses cross the Viaduct, they are not allowed any special right-of-way or other travel privilege; however, Transit is required to contribute one-third of the maintenance cost, whereas no other operator of any type of vehicle crossing the Viaduct is obligated for any maintenance costs.

This obvious and blatant discrimination is the result of a clearly erroneous decision by the court below in its construction of the contract. It is inconceivable that Transit would have entered into a contract which could reasonably be construed as having such a discriminatory effect. Transit bargained for an exclusive use, which it had for some time. When that exclusive use was no longer feasible or legal because of a change in motive power, Transit moved out of its special class and into the class with operators of other vehicles using the same motive power and requiring the same road facilities.

It is well settled by prior decisions of this Court that any state action which discriminates among members of the same class denies equal protection of the laws. See *Morey* v. *Doud*, 354 U.S. 457 (1957), and *Cotting* v. *Kansas City Stock Yards Co.*, 183 U.S. 79 (1901). The decision

of the court below places a discriminatory economic burden upon Transit, thus denying it equal protection of the laws.

3. This case is highly important to the Kansas City metropolitan area because of the effect it will necessarily have on the fares charged and services offered by Transit. The judgment is well in excess of the total net income of Transit for the past four years. During that same period, Transit made six applications to the appropriate state commissions for fare increases and route and service reductions, and received almost all relief requested. Moreover, during the current year an additional fare increase was requested and granted.

Transit is in the precarious position of being subject to comprehensive state regulation as to rates and service and, at the same time, open to substantial liability under contracts, covering a total of eighteen structures, for which it receives no consideration and, under the rule of law applied by the court below, unable to limit in any manner the extent of its liability.

The decision of the court below will affect adversely all persons in the Kansas City metropolitan area, with a population of approximately 1,200,000, who patronize Transit's service. Many such patrons are without economic means to own and maintain an automobile, yet they will be charged with maintenance of viaducts being used by owners of all types of vehicles who escape such added financial burden.

CONCLUSION

The Supreme Court of Missouri based its decision, sustaining a judgment against Transit for $668,870.38, on the assumption that Transit has an exclusive franchise from

the City and an exclusive use of the Viaduct. This assumption is completely erroneous and, in fact, many other common carriers of passengers use the Viaduct in the same manner as Transit. The imposition of a contractual obligation on Transit, the consideration for which is invalid on constitutional grounds, is so arbitrary and capricious that it denies due process. Furthermore, the decision of the court below has the effect of placing a discriminatory economic burden on Transit in derogation of its right to the equal protection of the laws. For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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